statutes do. To say that these are not self executing may be to refuse to execute the sovereign will of the people . . . . I should say the rule now is that such constitutional provisions must be held to be self executing when they can be given reasonable effect without the aid of legislation, unless it clearly appears that such was not intended."

Furthermore, it would seem that it is made a judicial question by the last sentence of the section in point (article two, section seventeen), which provides: "Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public."

W. J. A.

MINING LAW: EXTRALATERAL RIGHT: APEX.—The United States Circuit Court of Appeals recently confirmed the decisions of the Idaho Supreme Court and the federal District Court, in the cases of *Stewart Mining Company v. Bourne* and *Stewart Mining Company v. Sierra Nevada Mining Company*,[1] previously noted in this Review.[2] The apex of the vein in question crossed the south side line of the Senator Stewart Fraction claim practically at right angles, and continued across this claim to within a short distance of the north side line where the vein was cut off abruptly by a fault. This fault so undercut the vein that if the country rock to the north of the fault were eroded away, it would have left the end edge of the vein, where it intersected the fault, standing out like an overhanging cliff. This end edge of the vein abutting against the fault and which on its dip crossed an end line of the claim, was claimed by the owner of the Senator Stewart Fraction to be part of the apex. The court, however, held that this end edge of the vein along the fault was not an apex in the true sense of the word and gave rise to no extralateral rights.

In the course of its opinion the court said: "Nothing to the contrary appearing, the conclusive presumption is that the Senator Stewart Fraction claim was located not exceeding 1,500 feet along the course or strike of the discovery vein and not exceeding 600 feet in width." This statement is somewhat misleading, for a presumption which may be rebutted can hardly be properly called conclusive. The conclusive presumption is that there was a discovery vein in the claim,[3] that the land was properly located,

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[1] (Nov. 2, 1914), 218 Fed. 327.

[2] Stewart Mining Co. v. Bourne (1914), commented on in 2 Calif. Law Review, pp. 247-48, not officially reported. Also see: Stewart Mining Co. v. Ontario Mining Co. (1913), 23 Idaho 280, 132 Pac. 787, commented on in 1 Calif. Law Review, pp. 546-48, and illustrated by a diagram for a case with identical facts.

[3] Iron Silver Mining Co. v. Campbell (1892), 17 Colo. 267, 29 Pac. 513.

and that all preliminary and precedent acts necessary to authorize and justify the issuance of the patent had been performed as the law required.[4] But the patent is certainly not conclusive evidence of the physical existence of a lode to any continuous extent. Mr. Lindley in his work on Mines says that the issuance of a lode patent conclusively presumes the existence within its boundaries of an apex, but that it will not be presumed that this apex takes any particular direction or extends for any definite length.[5]

In another portion of its opinion the court makes a statement to the effect that the owner of the Senator Stewart Fraction claim is afforded no basis for the assertion of any extralateral right because the vein entered the claim through one of its side-lines and in its course or strike did not pass out of the claim at all. Though not essential to its decision this statement would seem to be too broad, as the best considered opinion does not support the idea that in order to exercise an extralateral right, the vein must pass through both side-lines.[6] In the case of end lines the courts have held that a limit is placed by the law on the length of the vein, beyond which the locator may not go, but the law does not say that he shall not go outside the vertical side-lines unless the vein in its course reaches the end-lines. In other words, the locator is given a right to pursue any vein whose apex is within his surface limits, on its dip outside the vertical side-lines, but may not in such pursuit go beyond the vertical end-lines.[7] The same rule should apply where the vein enters a side-line, for in reality this side-line becomes, in contemplation of the law, an end-line. For where it is developed that the location has in fact not been placed along, but across the course of the vein, the courts have held that those which the locator called his side-lines are his end-lines, and those which he called his end-lines are in fact side-lines.

W. J. A.

MORTGAGES: EXTINGUISHMENT BY TENDER.—In the case of *Cassinella v. Allen*,[1] the California Supreme Court held that where a mortgage provided for payment of attorneys' fees in the event of legal proceedings, a tender, after suit to foreclose was begun,

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[4] Davis v. Weibbold (1891), 139 U. S. 507 at p. 529, 35 L. Ed. 238, 11 Sup. Ct. Rep. 628; U. S. v. Iron Silver Mining Co. (1888), 128 U. S. 673 at p. 685, 32 L. Ed. 571, 9 Sup. Ct. Rep. 195; Los Angeles F. & M. Co. v. Thompson (1897), 117 Cal. 594, 49 Pac. 714.

[5] 3rd ed. § 780, p. 1899.

[6] See figure 23, p. 427, of Costigan on Mining Law.

[7] Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co. (1898), 171 U. S. 55, 43 L. Ed. 72, 18 Sup. Ct. Rep. 895, 19 Morr. Min. Rep. 370; Work Mining & Milling Co. v. Doctor Jack Pot Mining Co. (1912), 194 Fed. 620.

[1] (Nov. 24, 1914), 48 Cal. Dec. 465, 144 Pac. 746.